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ALEXANDER L. STEVAS,
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NO. 84-1453

IN THE

Supreme Court of the United States

KMA, INC.,

Petitioner,

v.

CITY OF NEWPORT NEWS,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE VIRGINIA SUPREME COURT

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QUESTIONS PRESENTED

I. Whether the United States Supreme Court should grant discretionary review where Petitioner's Petition for Writ of Certiorari does not set forth "special and important" reasons for review.

II. Whether Newport News City Code Section 27-4(2) creates an informal system of prior restraint by requiring landlords to become censors of the contents of tenant's stock of presumptively protected speech material.

III. Whether the Double Jeopardy Clause prohibits Petitioner's conviction for thirty-three violations of Newport News City Code Section 27-4(2).

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OPINIONS BELOW

Respondent accepts and incorporates by reference the opinions cited by Petitioner in the Petition for Writ of Certiorari.

STATUTES INVOLVED

Respondent accepts and incorporates by reference the statutes cited by Petitioner in the Petition for Writ of Certiorari, except that the full text of Newport News City Code Section 27-4 should be set out:

> It shall be unlawful for any person to knowingly:
>
> (1) Produce, promote, prepare, present, manage, direct, carry on or participate in any obscene exhibition or performance, including the exhibition or performance of any obscene motion picture, play, drama, show, entertainment, exposition, tableau or scene; provided, that no employee

of any person or legal entity operating a theatre, garden, building, structure, room or place which represents such obscene exhibition or performance shall be subject to prosecution under this section if the employee is not the manager of the theatre or an officer of such entity, and has no financial interest in such theatre, other than receiving salary and wages; or

(2) Own, lease or manage any theatre, garden, building, structure, room or place and lease, let, lend or permit such theatre, garden, building, structure, room or place to be used for the purpose of presenting such obscene exhibition or performance.

STATEMENT OF THE CASE

KMA, Inc. (KMA) was charged by a grand jury in the Circuit Court for the City of Newport News, Virginia, in thirty-three separate indictments with the violation of Section 27-4(2) of the Code of the City of Newport News. That section

provides the following:

> It shall be unlawful for any person to knowingly:...(2) Own, lease or manage any theatre, garden, building, structure, room or place and lease, let, lend or permit such theatre, garden, building, structure, room or place to be used for the purpose of presenting such obscene exhibition or performance.

KMA is a Pennsylvania Corporation that owns the premises described as 13772 Warwick Boulevard in Newport News, and which leases those premises to Wall Distributors, Inc. The lessee, Wall Distributors, operates an adult bookstore known as the "Book Boutique" at that location.

At a pretrial hearing, KMA moved to dismiss the indictments on the basis that Newport News Ordinance Section 27-4(2) imposed a prior restraint of presumptively protected speech in violation of the First and Fourteenth Amendments. The trial Court denied this motion. Also denied

was KMA's motion to consolidate the thirty-three indictments into a single-count indictment.

At trial, most of the relevant facts were stipulated. It was stipulated that the building at 13772 Warwick Boulevard had been owned by KMA since 1978 and that Wall Distributors, Inc., subleased the property under an assignment dated June 4, 1982, from the original lessee, Crusader Enterprises, Inc. The business on the premises had been operated by each tenant under the name "Book Boutique." It was further stipulated that each of the 33 films on which the indictments were based was obscene, that each was on a separate projector at the time of seizure, and that each had been viewed by customers of the tenant.

The record before the Virginia Supreme Court also showed that Crusader

Enterprises, Inc., had been convicted of violations of the obscenity ordinance and had failed to pay the fines imposed upon it. The sheriff, therefore, had levied upon all personal property of that corporation located at 13772 Warwick Boulevard to satisfy the judgment. By order entered June 8, 1982, the trial court directed the sheriff to remove such personal property from the premises and sell what was not obscene material. It is uncontroverted that the 33 films in issue were included in the property upon which the sheriff levied. It is also uncontroverted that before the charges were initiated against KMA, there was a finding of probable cause made by a magistrate.

A jury convicted Petitioner on all charges and fixed punishment at a fine of $1,000 for each offense, for a total fine of $33,000. The trial court entered judgment on the verdict.

KMA appealed these convictions to the Supreme Court of Virginia on the following issues: 1) Section 27-4(2) of the Newport News Code imposed a prior restraint upon expression in violation of the First Amendment to the United States Constitution; 2) the trial court erred in refusing to dismiss the indictments that failed to allege the essential element of scienter; and 3) the failure of the trial court to consolidate the thirty-three indictments into a single indictment violated the prohibition against double jeopardy. The Supreme Court of Virginia affirmed all of the convictions and subsequently denied KMA's petition to grant a rehearing on the case.

REASONS FOR DENYING THE WRIT OF CERTIORARI

I. THE SUPREME COURT SHOULD NOT EXERCISE ITS DISCRETION TO GRANT CERTIORARI WHERE THE PETITION FOR WRIT OF CERTIORARI DOES NOT SET FORTH "SPECIAL AND IMPORTANT" REASONS FOR REVIEW.

Rule 17.1 of the Supreme Court Rules states that review on a writ of certiorari will be granted only when "special and important" reasons exist to do so. No such reasons exist in this matter.

Petitioner argues that a special and important reason justifying review on a writ of certiorari exists because there is a conflict between the decisions of the courts of last resort of two states, the Virginia Supreme Court and the Louisiana Supreme Court, on a federal question. No such conflict exists: although the decision in the instant matter was predicated on federal grounds, the Louisiana Supreme Court decision in State v. Franzone, 384 So.2d 409 (La., 1980) was decided on the basis of the Louisiana Constitution. Thus, no conflict is present for the United States Supreme Court to address and the writ of certiorari should be denied.

In addition, although Petitioner asserts otherwise, the decision of the Court below was not contrary to any decision of this Court. As a consequence there is no reason to review that decision.

II. NEWPORT NEWS CITY CODE SECTION 27-4(2) DOES NOT CREATE AN INFORMAL SYSTEM OF PRIOR RESTRAINT BY REQUIRING LANDLORDS TO BECOME CENSORS OF THE CONTENTS OF A TENANT'S STOCK OF PRESUMPTIVELY PROTECTED SPEECH MATERIAL.

A. No prior restraint exists.

The Virginia Supreme Court held in its decision below that the Newport News City Ordinance being attacked was "facially constitutional and that it was constitutionally applied in this case under the First Amendment and also under Article I Section [illegible] of the Virginia Constitution." 228 Va _____. Petitioner continues to argue to this Court that



Section 27-4(2) represents an impermissible prior restraint and is, therefore, unconstitutional, although it totally ignores the reasoning of the Virginia Supreme Court which supported its decision. Since the Virginia Supreme Court's opinion is consistent with the decisions of this Court, ignoring it is fatal to Petitioner's arguments.

KMA was charged and convicted of thirty-three violations of Newport News City Code Section 27-4(2) which reads as follows:

> It shall be unlawful for any person to knowingly:...(2) Own, lease or manage any theatre, garden, building, structure, room or place and lease, let, lend or permit such theatre, garden, building, structure, room or place to be used for the purpose of presenting such obscene exhibition or performance.

It is Petitioner's argument that the above ordinance requires innocent landlords to

determine the contents of materials distributed on their property and that in order to avoid the risk of criminal prosecution landlords are required by the ordinance to censor all of the materials distributed by their tenants in bookstores and theatres. This argument was soundly and correctly rejected below.

The Virginia Supreme Court cited the case of Hamling v. United States, 418 U.S. 87, reh. denied, 419 U.S. 885 (1974) (hereafter Hamling) for the proposition that under the city ordinance a successful criminal prosecution depends upon the establishment of "whether the defendant had knowledge of or reason to know of the character and content of the material." 228 Va _____, Thus,". . . The ordinance no more requires an innocent landlord to determine the content of materials distributed on his premises than statutes proscribing knowing sales

of obscene materials require an innocent bookseller to ascertain the content of all the materials he sells." Id.

The strawman erected by Petitioner is the same one argued in Hamling where this Court rejected it. The Petitioners in Hamling had been convicted pursuant to a federal statute prohibiting mailing of obscene materials and argued that their conviction was unlawful since the Government had not been required to prove that they knew the materials which they had mailed were obscene. The Hamling Court cited with approval a previous opinion of the Court, Rosen v. United States, 161, U.S. 29, 16 S. Ct. 434, 40 L.Ed. 6066 (1896), in which the following had been said:

> The statute is not to be so interpreted. The inquiry under the statute is whether the paper charged to have been obscene, lewd, and lascivious was in fact of that character,

> and if it was of that character and was deposited in the mail by one who knew or had notice of its contents, the offense is complete, although the defendant himself did not regard the paper as one that the statute forbade to be carried in the mails. Congress did not intend that the question as to the character of the paper should depend upon the opinion or belief of the person who, with knowledge or notice of its contents, assumed the responsibility of putting it in the mails of the United States. The evils that Congress sought to remedy would continue and increase in volume if the belief of the accused as to what was obscene, lewd, and lascivious was recognized as the test for determining whether the statute has been violated." at 418 U.S. 120-121.

Prosecution by the City of Newport News under its Ordinance Section 27-4 is clearly lawful for reasons similar to those above: KMA is no more required to be a censor than were the Petitioners in Hamling. Petitioner's protestations to the contrary should be unavailing.

Hamling remains the law and no reason has been produced by KMA to reverse or

modify it. Petitioner can establish no valid prior restraint argument and its petition for a Writ should therefore be denied.

B. Petitioner's authority distinguished.

Petitioner places great reliance upon the case of State of Louisiana v. Franzone, 384 So.2d 409 (La. 1980) (hereafter Franzone) to support its prior restraint argument. This case provides precious little aid to petitioner's federal constitutional arguments because it is based upon the Supreme Court of Louisiana's interpretation of the Louisiana State Constitution. Admittedly, the Louisiana Court used federal constitution decisions as its framework for analysis, but its ultimate decision was that the statute being reviewed violated its state constitution and not the federal constitution. The decision, there-

fore, does little to buttress Petitioner's arguments.

Even if Franzone and KMA were interpreted to be cases involving directly conflicting decisions based upon the Federal Constitution, a somewhat farfetched argument, the Virginia Supreme Court correctly distinguished the two decisions.

The distinguishing feature which undoubtedly causedthe KMA and Franzone Courts to arrive at varying decisions is that the Virginia Court found that no person could be charged with a violation of Section 27-4(2) without there first being a determination of probable cause by a neutral and detached magistrate. This protection was specifically determined to be not available in Franzone. The fears expressed by the Franzone Court were that landlords and tenants would be forced to consult local prosecutors with regard to leasing and publication, thus

placing the prosecutor in the role of censor; the KMA Court rightly found this to be unjustified in Virginia. Landlords in Newport News, Virginia, cannot be said to have an affirmative duty to determine the nature of materials disseminated by a tenant. Instead, a landlord may be prosecuted only if he purposefully allows his property to be used for distribution of obscenity or, after becoming aware of such use, continues to permit the illegal activity. No valid prior restraint argument can therefore be advanced regarding the Newport News ordinance attacked by Petitioner.

III. NO DOUBLE JEOPARDY CLAUSE PROBLEM PROHIBITS PETITIONER'S CONVICTION FOR THIRTY-THREE VIOLATIONS OF NEWPORT NEWS CITY CODE SECTION 27-4(2).

The Virginia Supreme Court decision below disposed of Petitioner's Double

Jeopardy argument in the following manner:

> Because the wording of the ordinance discloses the legislative intent that each obscene motion picture shall constitute the basis for a separate offense, and because the evidence, i.e., the film, was different in each case, we hold that the trial court did not err in denying KMA's motion to consolidate the indictments. 228 Va. _____

This holding is clearly consistent with the decisions of this Court. Most particularly, there is no reasoned basis for this Court to substitute its judgment for the Virginia Supreme Court's interpretation of legislative intent as it examined the application of the ordinance in question.

The reasoning of the decision below was impeccable and merits presentation:

> Section 27-4 of the Newport News Code, dealing with obscene exhibitions and performances, comprises two subsections. Section 27-4(1) makes it unlawful knowingly to 'present...any obscene

exhibition or performance, including the exhibition or performance of any obscene motion picture.' Section 24-4(2) makes it unlawful knowingly to '[o]wn ...any...building...and lease... or permit such...building...to be used for the purpose of presenting such obscene exhibition or performance.'

In Educational Books, Inc. v. Commonwealth (Record No. 831830, this day decided), we held that under the provisions of Code § 18.2-374, prohibiting the sale of 'any obscene item,' the sale of each one of a number of obscene magazines constituted a separate offense. By the same rationale, under the provisions of Section 27-4(1), prohibiting the presentation of 'any obscene exhibition or performance,' the presentation of each one of a number of obscene motion pictures would constitute a separate offense. Aside from the legislative intent manifest in the language of the ordinance, the same evidence is not used where there are multiple charges arising from presentation of different obscene motion pictures. The determination of obscenity must be made on the basis of each film.

In the present case, each indictment required proof that KMA (1) knowingly (2) owned the building and (3) permitted its use (4) for the purpose of

> presenting an obscene motion picture therein described. Section 27-4(2) makes it unlawful for a person knowingly to own a building and permit it to be used for the purpose of presenting 'such obscene exhibition or performance.' It is apparent that 'such obscene exhibition or performance' refers to the 'exhibition or performance of any obscene motion picture' proscribed by Section 27-4(1). Under Section 27-4(1), each exhibition or performance forms the basis of a separate unlawful act. The language of Section 27-4(2), in conformity with that of Section 27-4(1), has the same effect. Each offense charged was knowingly owning a building and permitting its use for presentation of one obscene film, not for presentation of obscene films. The ordinance is directed at each obscene exhibition, rather than at obscene exhibitions collectively.

Petitioner concedes in his Petition to this Court at page 18, that "It has long been the law that the allowable unit of prosecution lies within the discretion of the legislative, subject only to constitutional limitations." And, Peti-

tioner also correctly cites Bell v. United States, 349 U.S. 81, 99 L.Ed. 901, 75 S. Ct. 620 (1955), for the proposition that when a legislature fails to define a criminal unit, or the legislative intent in that regard is ambiguous, that it is the duty of the courts to determine the precise nature of the criminal unit and that when making such a determination, any ambiguity should be resolved in favor of the criminal defendant. When applying this law, however, it is clear that no reason exists to tamper with the decision below.

The Virginia Supreme Court had no difficulty interpreting the Newport News ordinance. It did not find the ordinance ambiguous. It did not conduct a convoluted search in an effort to create ambiguity where none exists. Instead, the Court outlined four simple elements of proof which were clearly distinct for each of the

thirty-three violations alleged. Its reading of legislative intent is rational and is one to which deference should be given. As this Court has most recently reiterated "Because the substantive power to prescribe crimes and determine punishments is vested with the legislature, United States v. Wiltberger, 5 Wheat. 76, 93 (1820), the question under the Double Jeopardy Clause whether punishments are 'multiple' is essentially one of legislative intent, see Missouri v. Hunter, _____ U.S. _____, _____ (1983)" Ohio v. Johnson, 52 LW 4748, 4749. (In fact, the Ohio v. Johnson Court at footnote 8, page 4749, noted that "Even if the crimes are the same under Blockburger, if it is evident that a state legislature intended to authorize cumulative punishments, a court's inquiry is at an end.") The court below has unimpeachably set forth the intent of Section 27-4 and found prosecu-

tions pursuant to it not to violate a multiple punishment prohibition. Its holding should not be further reviewed.

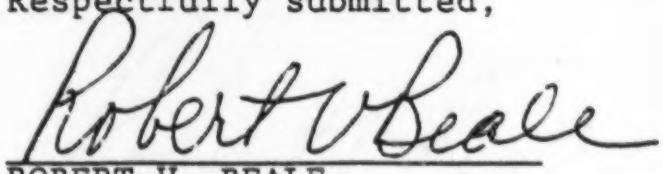
CONCLUSION

The decision below was in accordance with a reasoned application of the law and no special and important reasons exist to permit review of the decision on writ of certiorari. Specifically, there is no conflict between decisions of courts of last resort of two states and there is no conflict between the Virginia Supreme Court's decision and decisions of this Court.

Newport News City Code Section 27-4(2) does not create an informal system of prior restraint in violation of the Constitution of the United States. Nor does the ordinance permit multiple prosecutions in violation of the Double Jeopardy Clause of the Constitution of the United States.

For the foregoing reasons, Respondent respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

This is to certify that in accordance with Rule 28 of the Rules of the Supreme Court, I have on this day served the required three (3) copies of the Respondent's Brief in Opposition to Petition for Writ of Certiorari to the Virginia Supreme Court by depositing same in a United States mail box with First-Class postage prepaid and addressed to the following attorney for Petitioner:

Arthur M. Schwartz
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Denver, Colorado 80202

This 18th day of April, 1985.

Robert V. Beale

ROBERT V. BEALE